No. 00-407 (4)

In The
Supreme Court of the United States

David S. Fichtenberg, pro se
Petitioner,

v.

Federal Communications Commisison
And United States of America,
Respondents.

On Petition For Writ Of Certiorari to
The United States Court of Appeals
For The Second Circuit

Reply of Petitioner to Brief in Opposition

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A. Introductory Statement

Petitioner is keenly aware of the beneficial economic and personal opportunities that wireless technology is bringing now and in the coming decades to our nation. Yet, with these benefits comes a growing concern of the public about adverse health effects from the radio frequency (RF) radiation from this technology [DF Petition (Pet.) 27].

Respondents' silence about such concerns should not suggest public confidence in the RF rules of the Federal Communications Commission ("FCC"). Indeed, public concern is evidenced by coverage in national magazines: "Is Your Cell Really Safe?", Newsweek, Aug. 7, 2000, p. 63; Worrying About Wireless," Scientific American, September 2000, p. 20-21; "Do Cell Phones Need Warnings?", Time, October 9, 2000, p.66-67, and on television programs: ABC 20/20 reporting on "Wireless Worries," on October 20, 1999 and May 26, 2000; ABC News, May 11, 2000 on "Cell Phone Risk for Kids?"; CNN TV, August 9, 2000, Larry King Live on "Do Cellular Phones Cause Cancer?"

This Court's review is needed in order to promote public safety and the confidence the public, business community, and state and local governments need to be assured the challenged regulations and rule making process were scrutinized and any legal defects corrected, considering,

> "close scrutiny of administrative action is particularly appropriate when the interests at stake are not merely economic interests in a license or rate structure, but personal interests in life and health" [*Welford v. Ruckelshaus*, 439 F. 2d. 598, 607 (D.C. Cir. 1971)]

B. Reply to Respondents' Assertions of Fact

Respondents' Assertions that federal health agencies' concurred with FCC's rule is undermined by the record

Respondents' National Environmental Policy Act (NEPA), Adm. Procedures Act (APA), and non-delegation of authority arguments depend on assuming the federal health agencies: Environmental Protection Agency (EPA),

Food and Drug Adm.(FDA), National Institutes of Occupational Safety and Health(NIOSH), and the Occupational Safety and Health Adm.(OSHA) "concurred in the final [FCC RF] standard." [*RF Order*, 1996 Notice FCC 96-326, 11 F.C.C. Rcd. 15129-151313; RF Reconsideration Order, 12 F.C.C. Rec. at 13538. 1997 Notice FCC 97-303], Respondents Brief (Resp. Br.22) Yet, the record shows evidence these agencies did not concur (pages lodged at the Court are shown herein by prefix 'L').

1. The FCC refuses to reveal what the federal health agencies agreed to

In July 1996, the federal health agencies responded to a draft document prior to publication of the final rule. [L74-L76; Bill Jenkins' Brief in Support (BJ Br.) p.80-83; Cellular Phone Taskforce (CPT) Reply brief at the Court of Appeals (CPT CA Reply) p. 25-26, B45-B47. The absence of this draft document from the record and the FCC's refusal to reveal it, even under a Freedom of Information Act request [BJ Br. 80-83, L74-L76] belies FCC claiming the agencies concurred. Indeed, there is evidence that they did not agree with significant aspects of the final rule. FCC itself stated:

> "The Report and Order that was adopted may *differ* in some respects from the [draft] document because it incorporated comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies .... "(emphasis added) BJ Br. 83; L76.

Indeed, comments in the record suggest that the agencies did *not* concur in important respects with the final rule.

2. EPA and NIOSH objected to relaxed exposure standards in public thoroughfares

The FCC's standard allows 500% of the EPA's and NIOSH's recommended exposure limits "where exposure is of a transient nature." These places include residential sidewalks, parks, and bus stops. RF Order, par.# 43; BJ Br. at 14-18, 25-26; EPA comments of Nov. 10, 1993 at court below Joint Appendix (JA) 443, L33; NIOSH Jan. 10, 1994, JA 491-92, L47-L48; court below Ad-Hoc Assoc. et al. main brief that DF joined (AHA CA Br.) at 28, n.33.

3. EPA, FDA, and NIOSH do not agree with the FCC's assertion its standard also applies to long-term, chronic, non-thermal exposure conditions

EPA, FDA, and NIOSH told the FCC that the 1992 ANSI and the 1986 NCRP RF radiation guidelines the FCC was relying on do not apply to long-term, chronic exposure to low level (non-thermal) RF radiation. [ANSI is the American National Standards Institute; NCRP is the National Council of Radiation Protection and Measurements]. Both in 1993 and 1996, the FDA told the FCC that the 1992 ANSI standard does not address the issue of long-term, chronic exposures to RF fields. JA 451, L41, JA 616, L79.

EPA scientist Norbert Hankin wrote in 1996 that "Both the NCRP and ANSI/IEEE standards are thermally based, and *do not apply to chronic, nonthermal exposure situations*. (emphasis added) JA 1042 (L95).

Similarly, Respondents' asserted that "ANSI and NCRP had reviewed *extensive* scientific literature on non-thermal effects and found such phenomena not to be supported by the evidence." Resp. Br. 22. Yet, ANSI reported a "*paucity* of reliable data on chronic [non-thermal] exposures." (emphasis added) [ANSI 1992, p.27, lodged with the Court, and JA 357]; NCRP stated "the Western reports are largely based on acute studies of laboratory animals exposed at relatively high levels of irradiation." NCRP p. 169, JA 295.12.

4. EPA reported that the data bases of ANSI and NCRP needed updating, FDA and OSHA agreed

(a) Respondents' assert EPA "had extensive familiarity with the scientific and medical literature."

Resp. Br. 22. Yet, EPA's own letter of Nov. 9, 1993 states, "The FCC should consider requesting the NCRP to revise its 1986 report to provide an updated, comprehensive review [of RF effects] and recommendations for exposure limits." JA 439, L29. Also, EPA told the FCC the standards EPA was developing in 1995 were "interim" standards only designed to protect against "heat/temperature related effects", not against non-thermal or modulation effects. JA 565-567, L55-L57. Respondents' reliance on EPA's monitoring the chronic, non-thermal RF effects literature is misplaced. Even though FDA (JA 450, L40) and OSHA (JA 522, L49) also indicated to the FCC that the standards upon which it relied

were out-of-date, still the FCC concluded, "represent the best scientific thought." *RF Order*, par.#168

(b) EPA indicated to FCC again in 1999 that EPA's database was old. EPA said "[t]he information base [of EPA] on non-thermal effects has not changed significantly since the EPA's original comments in 1993 . . " [R. Brenner EPA Acting Dep. Ass. Adm.for Air and Radiation, April 30, 1999, Resp. Br. 23, n.12]. So in 1999 the FCC and Court of Appeals were told EPA's database was still out of date, with EPA relying on the old thermal effects studies that EPA said needed updating by NCRP, see above and B5 below.

5. Respondents do not dispute the FCC's not asking the federal health agencies evaluate public comments at any time during the rule making.

Respondents stress, "FCC consulted extensively with all of the federal health and safety agencies." (Resp. Br. 23). Yet, they are silent on whether the contents of the docket were the subject of *any* of those consultations prior to the *RF Order*, and admit they were not during the reconsideration period. DF Pet.27-28; CPT Pet. 5-6,12-18; CPT Reply Br. 5-9]. Also, a May 19, 1999 letter of EPA RF scientist N. Hankin states that to his knowledge "the FCC has not asked EPA to review and evaluate *any* of the materials" pertaining to this rule making. (emphasis added) L100, filed at court below; DF Pet. 45,46. Thus, none of the hundreds of studies submitted to the FCC by the public nor comments analyzing them were submitted to FCC's experts for evaluation throughout the 4½ years of the rule making; see 4(b) above.

6. Federal health agencies disagreed with the FCC's conclusion that there is no evidence to *suggest* harm if its rules are followed

FCC concluded, "There is no evidence to *suggest* that transmitters or facilities that comply with our guidelines will cause adverse health effects." (emphasis added*) RF Reconsideration Order*, par.#111; AHA CA Br. 39]. FCC justified its Finding of No Significant Impact (FONSI) based on this conclusion [Opinion A18, in Appendix A submitted by Citizens for Appropriate Placement of Telecom-munications Facilities ("CAPTF)", and hereafter App. A"]. Yet, EPA told FCC "meaningful studies" of non-thermal effects showing "injury to the eye" *exist*, and that "reports *suggesting*

potentially adverse effects (cancer) *may exist*" (emphasis added) JA 443.1, L34. FDA told FCC about the "*existence* of animal studies that *suggest* an association between chronic low level exposures and acceleration of cancer development. Other studies have been published *since* the finalization of the standard that *strengthen* this concern." (emphasis added) JA 450, L40. NIOSH told FCC, "Non-thermal biological health effects have been *reported* in some studies . . . " JA 488,491, L44, L47; AHA CA Br. 34.

C. Reply Argument

#1. On dodging responding to comment in the record:

(a) Respondents incorrectly assert [Resp. Br. 23, n.12] that Petitioner accepts FCC's logic for not submitting public comments to its advising agencies. Not so. See p.3(B4). Also, since there was a paucity of data, the new material presents a 'new picture' Its review is needed so the relevant data is reviewed to assure a rational connection between the facts found and choice made. NEPA also requires responding to public comment Respondents do not address the above. See details at DF Pet. 27-28; CPT Pet. 12-18.

(b) FCC statute provides for reconsideration: See statute 47 USC 405 [DF Pet. 45] and it must be granted when:

(i) "[V]alid grounds for rehearing are manifest error or omission so material that their correction will result in substantial alteration of original decision," *Re Florida Gulfcoast Broadcasters,Inc*, .37 FCC. Rep. 833 (1964).

(ii) "new and relevant evidence" is appropriate to consider "when new evidence *might* have gone far toward undermining basis for Commission's conclusions.." (emphasis added) *Eagle Broadcasting Co. v FCC*, 514 F.2d 852 (1975).

Ignored comments met the above criteria.

(c) NEPA requires documentation to permit record reviw (40 CFR 1502.24) and encouraging public involvement (40 CFR 1506.6(a). FCC's ignoring comments and keeping the draft proposal secret p.2(B1) violates these NEPA rule.

#2: Keeping RF exposure 'as low as reasonably achievable'(ALARA).

Respondents claim FCC properly rejected the ALARA policy because (a) rules to minimize power, e.g. 47 USC 324,

to RF interference; (b) FCC never had adopted ALARA; and (c) FCC has discretion to reject this policy based on the FCC balancing competing interests (Resp.Br. 24).

(a) With regard to 47 USC 324, the statute should be enforced regardless of speculation of the motivation behind it. It requires all of FCC licensees use the minimum power necessary for the communication desired – which is substantively the ALARA policy.

Thus, for example, the FCC must require manufacturers of cellular phones to design their products to use minimum power, thereby reducing risks of both RF interference with electrical devices and possible health risks.

Also, NEPA requires ALARA. NEPA requires of agencies the "Use of all practicable means to * * * avoid or *minimize* any *possible* adverse effects of their actions upon the quality of the human environment." 40 CFR 1500.2(f). .

(b) With regard to Respondents claim that "ALARA was never the standard," [Resp. Br. 24], Petitioner notes that in 1985, the FCC adopted the ANSI 1982 RF standard (lodged with the Court) which does contain the ALARA requirement [Sec. 5, Explanation at p.11, and JA 318]. Also, in 1985 the FCC issued its OST Technical Bulletin No. 65 (lodged with the Court) describing how to comply with the FCC's RF rules and which explicitly noted the ALARA rule (Sec. "The ANSI Protection Guides for Exposure to RF Radiation", p.5,6). [2nd Report and Order, Gen. Docket No. 79-144, 2 F. C.C. Rcd 2064, 2077 n. 5; DF Pet. 28; BJ Br. 12; AHA CA Br. 31-33, AHA CA Reply 14-15].

By failing to explain its rescinding its ALARA policy, the FCC violated the reasoned analysis this court requires [see DF Pet. 29, citing *Motor Vehicles Mfrs. Assn. v. State Farm Mutual*, 463 U.S. 29, 42 (1983)].

(c) With regard to the FCC's 'balancing' of competing interests, Petitioner notes that the FCC's balancing equation was based on FCC's erroneous conclusion that, "There is no evidence to *suggest* that transmitters or facilities that comply with our guidelines will cause adverse health effects." [Reconsideration Order, par.#111, discussed above at B6, p.4-5]. Thus, this 'balancing' fails this Court's requiring "a rational connection between facts found and choice made." *Motor Vehicles Id. 43*, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Also, the FCC's 'balancing equation' was a mere reciting of an empty phrase, devoid of any documentation of analyses [see Reconsideration Order, par. #2, JA 2203]. It is similar to the reciting of "substantial uncertainty" in *Motor Vehicles* Id. 52 [DF Pet. 30]. Its documentation void fails NEPA rules for cost/benefit and other analyses [40 CFR 1502.23-24].

#3 Functional compliance issues: Petitioner agrees with CPT Reply at 1-3. Also, see rule that "federal agencies act according to the *letter* and spirit of the Act NEPA]." (emphasis added) [40 CFR 1500.1(a)].

#4: Unconstitutional delegation of authority: Petitioner agrees with CPT Reply 3-5, Worsham Reply 7-10.

#5 Health effects v. environmental effects

Petitioner agrees with Worsham Reply 1-10. Also, Respondent did not address points at DF Pet. 33-35; BJ Br. 26-29. In particular Respondent ignored argument that local jurisdictions were authorized by 47 USC 332(c)(3)(A) to regulate RF exposure to protect health within general zoning authority pertaining to the *operation* of wireless facilities (see BJ Br. 27, 44) and Joint conference report (BJ Br. 28, 55). Health regulations to protect from RF exposure during the *operation* of wireless facilities was not included in the list of preempted functions in 47 USC 332(c)(7)(B)(iv) and Telcom. Act of 1996 sec. 601 protects from implied preemption. *Appeal of Graeme et al.* 975 F.Supp. 570, 574 (D.Vt. 1997) [AHA CA Reply 30].

#6. FCC preemption violates 10th amendment

(a) Court enforcement actions are "commandeering"

Respondents agree it is unconstitutional to commandeer local jurisdictions "by directly compelling them to enact and enforce a federal program." Resp. Br. 13, citing *New York v. United States*, 505 U.S. 144, 161 (1992). But Respondents remain silent when given evidence courts have compelled municipalities to enforce the FCC program by ordering them to issue permits against their will. DF Pet. 37-38; CAPTF Pet. 17-18; CAPTF Reply 4-5. Note that the only lawful 'commandeering' is when States are obliged to follow the Constitution, including the civil rights of persons.

(b) The FCC preemption is 'de facto' commandeering

Respondents' reliance on *Hodel v. Virginia Surface Mining & Reclamation Ass'n* 452 U.S. 264, 290 (1981) [Resp. Br. 13] is misplaced because that case is not similar to the instant case.[see DF Pet. 35-38; BJ Br. 29-36].

Federal commandeering occurs when:

#1: States or local jurisdictions must regulate in the preempted field, *whether explicit in the challenged statute or not, e.g. states requiring counties to regulate,*

#2: Federal statute specifies in some respects what that regulation must include.

The challenged statute in *New York* is an example of 'explicit' commandeering because it explicitly required states to regulate low-level nuclear waste by either the ways of Congress or to take title. *New York* Id. 176. In contrast, *Hodel* is 'simple' preemption *without* commandeering because the challenged surface mining act allowed States to participate if they met federal criteria, or else a comprehensive federally administered program suitable to replace those of the States would apply. *Hodel* 288.

In *Hodel*, whether it would be lawful for States to abandon surface mining regulation requires considering:

(#A) "it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for the general welfare, by any and every act of legislation, which it may deem to be conducive to these ends." [*Nebbia v. People of New York,* 291 U.S. 502, 523 (1934). This duty is noted at DF Pet.36, CAPTF passim.

(#B) "[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Pruneyard Shopping Center v. Robbins* 447 U.S. 74, 84 (1980), citing *Nebbia.*

(#C) This Court decided state safety regulations may be preempted only upon "the taking effect of a federal measure found suitable to put in its place." *H.P. Welch Co. v. New Hampshire,* 306 U.S. 79, 85 (1939).

Hence in *Hodel*, since there was a suitable federal program, local legislation enacted to abandon the field could meet due process constitutional test of being reasonable.

However, in *Federal Energy Regulatory Comm. (FERC) v. Mississippi*, 456 U.S. 742 (1982), this Court found abandonment of State Utility Commissions a lawful choice, although it "may be a difficult one" because there was no alternative federal program. *FERC* Id. 766. However, that case did not involve public health and safety concerns, and some States had no utility commissions. Thus, abandoning this field was a 'real' choice – since some States had chosen it. The choice of abandonment would not endanger life, safety, or property, so *Welch* would not apply. There was no commandeering since, as in *Hodel*, there was a real choice.

In contrast to *Hodel* and *FERC*, de facto commandeering occurred in *Printz v. United States*, 521 U.S. 898 (1997). Here, the 1993 Brady Handgun Violence Prevention Act (Brady Act) required State chief law enforcement officers (CLEOs) *shall* conduct background checks of gun purchasers. That requirement, the Court held, 'compel[led] the States to enact or administer a federal regulatory program." Printz Id at 933 (quoting *New York* Id at 188).

There *was no explicit command* in the Brady Act requiring States to remain in the preempted field of law enforcement – in contrast to New York where there *was an explicit command* to enter the field of regulating low level nuclear waste. However, as there was no suitable federal law enforcement alternative, this Court presumably decided that neither States nor local jurisdictions could meet their public duty (in Nebbia) and still lawfully abandon this field.

'De facto' commandeering occurs, as in *Printz*, when local legislation enacted to avoid administering a challenged statute would be unlawful, even though the challenged statute does not explicitly require regulation in this field. This happens when there is no suitable federal program, because such legislation would fail a test of reasonably meeting the public duty obligation to protect health and safety. It can also be found unlawful because state law requires regulating in this field. Hence a merely preempting statute is, as applied, commandeering. This is 'de facto' commandeering and meets the conditions of Printz.

The same conditions occur in the instant case. Chaos results if local governments abandon zoning and building code enforcement without a suitable federal program option. See *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000). Only if

there is a suitable federal program to address all zoning and permit issues is there 'real choice' to abandon the field.

(c) Many States require local jurisdictions enforce building and fire codes, e.g. the State of Washington (DF App. B1, B2). States with such requirements cannot lawfully void them due to the public duty rule that due process requires. More examples will follow if Writ is granted.

(d) Arguendo, even if the FCC preemption statute is lawful, then it is unlawful as applied because it preempts local health regulations of chronic RF exposure and the federal health agencies have stated the FCC rules do not address this key relevant factor, let alone adequately (B3 at p.2.) To preempt, decisions must be "based on a consideration of the relevant factors" *Motor Vehicles Id.* 43, and general health and environmental knowledge is not enough, rather those setting the preemption rule must be "constantly in session, whose time is exclusively given to the subject." *Mistretta v. United States*, 488 U.S. 361 (1989) (citations omitted) [see CPT Pet. 22].

Respondents question Petitioner's standing to make a 10th amendment challenge, but notes *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) [Resp. 13, n.7] and notes Respondents' other citations. The 10th amendment "ultimately secures the rights of individuals" (*Gillespie* Id. 703). Petitioner has a personal stake in his commandeering challenge. He noted that as President of Ad-Hoc Association and of other organizations he represents the concerns of his members to local officials unable to meaningfully consider their concerns, yet who are forced to make the permit decisions. See DF Pet. 12-15, BJ Br. 58-59. Finding the preemption commandeers will give relief - placing authority to set RF exposure limits with those who also issue permits

Conclusion: For the reasons stated above the Petition for a Writ of Certiorari of Petitioner should be granted.

Respectful submitted,

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Reply Appendix A

Selected National Environmental Policy Act (Act) Regulations

40 CFR Sec. 1500.1 Purpose

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, goals, (sect 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains 'action-forcing' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of sec. 101.

40 CFR Sec. 1500.2(f)

[Federal agencies shall to the fullest extent possible:

Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

40 CFR Sec 1502.23 Cost-benefit analysis

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

40 CFR Sec. 1502.24 Methodology and scientific accuracy

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

40 CFR Sec. 1506.6(a)

[Agencies shall] make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

Reply Appendix B
State Regulations pertaining to local jurisdiction enforcement of building codes

Building code requirements of State of Washington
From Revised Code of Washington (RCW)

RCW 19.27.031, paragraphs (1)-(3)
State building code, Adoption,Conflicts, Opinions
Except as otherwise provided in this chapter, there shall be in effect in all counties and cities the state building code which shall consist of the following codes which are hereby adopted by reference:

(1) Uniform Building Code and Uniform Building Code Standards, published by the International Conference of Building Officials;

(2) Uniform Mechanical Code, including Chapter 13, Fuel Gas Piping, Appendix B, published by the International Conference of Building Officials;

(3) The Uniform Fire Code and Uniform Fire Code Standards, published by the International Fire Code Institute: PROVIDED, That, notwithstanding any wording in this code, participants in religious ceremonies shall not be precluded from carrying hand-held candles.

RCW 19.27.060, paragraph (1)
Local building regulations superseded -- Exceptions.

(1) The governing bodies of counties and cities may amend the codes enumerated in RCW 19.27.031 as amended and adopted by the state building code council as they apply within their respective jurisdictions, but the amendments shall not result in a code that is less than the minimum performance standards and objectives contained in the state building code.

(a) No amendment to a code enumerated in RCW 19.27.031 as amended and adopted by the state building code council that affects single family or multifamily residential buildings shall be effective unless the amendment is approved by the building code council under RCW 19.27.074(1)(b).

(b) Any county or city amendment to a code enumerated in RCW 19.27.031 which is approved under RCW 19.27.074 (1)(b) shall continue to be effective after any action is taken under RCW 19.27.074(1)(a) without necessity of reapproval under RCW 19.27.074(1)(b) unless the amendment is declared null and void by the council at the time any action is taken under RCW 19.27.074(1)(a) because such action in any way altered the impact of the amendment.